United States Courts
Southern District of Texas
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Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 § **(Consolidated)**
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§ CLASS ACTION
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	

LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f)

1405

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITIES

I. Introduction

The motion for summary judgment filed by defendant Bank of America Corporation ("Bank of America") seeks dismissal on the basis that a reasonable jury could only conclude this case is one of mistaken identity. Bank of America's "Undisputed Facts" and supporting affidavits largely serve a single purpose, to identify Bank of America's subsidiary involved in the transactions underlying Lead Plaintiff's claims. Simultaneously, Bank of America admits facts demonstrating that Bank of America owns and controls its subsidiaries, notwithstanding Bank of America's assertion those subsidiaries maintain some corporate formalities. According to Bank of America, a jury could now only conclude Bank of America is not liable because the only reasonable inference to draw from Bank of America's identification of its subsidiaries is that Bank of America did not violate securities laws.

But Bank of America's admissions and its "Undisputed Facts" fail to demonstrate the absence of any genuine issue justifying dismissal, and contradictory inferences may be drawn from the evidence. Indeed, a reasonable jury could easily draw a contradictory inference from the evidence Bank of America claims justifies dismissal and its admissions, namely that Bank of America violated securities laws through Bank of America's subsidiary. Without more evidence Bank of America cannot controvert its liability. In any event, Banc of America Securities LLC is now a named defendant in this action and Bank of America will face liability for securities violations of its subsidiary in addition to its own direct liability.

Bank of America's motion is meritless for a number of other reasons. Bank of America is potentially subject to secondary liability for being a control person under federal securities laws. *See infra* §III. Bank of America does not (and cannot) refute its control-person liability, and obviously absent from Bank of America's motion is any mention of Lead Plaintiff's claims under §15 of the Securities Act of 1933. Veil piercing is irrelevant to this case because Bank of America's "corporate veil" need not be "pierced" in order for Bank of America to be liable under the securities laws. *See infra* §V. Bank of America also faces liability under agency and enterprise legal theories. *See infra* §§II.B, IV.

Bank of America does not meet the substantial burden upon it in seeking summary judgment, and it should not. Issues of control, agency, and veil-piercing are fact intensive and normally most appropriate for a jury rather than determination by summary judgment. *See infra* at 3, 10, 12-14. Bank of America's motion should be denied for failing to demonstrate the absence of a genuine issue of material fact. However, if this Court decides that Bank of America's motion is, instead, premature, Bank of America's motion should be denied or continued pursuant to Rule 56(f). While there is an unprecedented amount of publicly-known and counsel-investigated evidence in this case, Bank of America's motion was filed days after this Court lifted the discovery stay imposed by the PSLRA. Lead Plaintiff has submitted with this Opposition an affidavit which meets the standards of Rule 56(f) and alternatively requests denial or continuance pursuant to Rule 56(f), should it be necessary. *See infra* §VI.

For all the reasons stated, Lead Plaintiff respectfully requests that the Court deny Bank of America's motion for summary judgment.

II. Legal Standards Pursuant Rule 56(c)

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only when "'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992).[1] To support a motion for summary judgment, "the moving party [has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Not only "must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them." *Donahue v. Windsor Locks Bd.*, 834 F.2d 54, 57 (2d Cir. 1987); *accord Anderson*, 477 U.S. at 254-55. Summary judgment is not appropriate "where contradictory

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[1] *Accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Also, here, as elsewhere, emphasis is added and citations and footnotes are omitted unless otherwise noted.

inferences may reasonably be drawn from undisputed evidentiary facts." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1334 (9th Cir. 1980).

Movant "bears a ***substantial*** burden in showing that it is entitled to summary judgment." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469 (1992). A defendant meets that burden only "when he '***conclusively show[s]*** that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them.'" *Id.* at 469 n.14. A district court "is not entitled to weigh the evidence and resolve disputed underlying factual issues." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). When "'direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.'" *McLaughlin v. Liu*, 849 F.2d 1205, 1298 (9th Cir. 1988). The non-movants' "version of any disputed issue of fact thus is presumed correct." *Eastman Kodak*, 504 U.S. at 456.

The issues in this case are particularly ill-suited for summary adjudication. The issue of ***control*** is a fact-intensive question more appropriate for a jury rather than for determination on a motion for summary judgment. *See, e.g., In re Executive Telecard, Ltd. Sec. Litig.*, 913 F. Supp. 280, 286 (S.D.N.Y. 1996); *infra* at 10. The question of ***agency*** is inherently fact specific and ordinarily an issue for the jury. *See, e.g., TransAmerica Leasing, Inc. v. La Republica de Venez.*, 200 F.3d 843, 849 (D.C. Cir. 2000); *infra* at 12-13. Similarly, ***veil piercing*** is "heavily fact-specific" and generally must be submitted to a jury. *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 694 (5th Cir. 1985). *See also infra* at 14.

A. Bank of America's Claims of Corporate Separation Fail

Bank of America's claims of separateness from its subsidiary Banc of America Securities LLC are belied by documents from both Bank of America's and Banc of America Securities LLC's regulatory filings, as well as other admissions. For example, in the December 31, 2002 statement of financial condition filed by Banc of America Securities LLC, which prominently features the same logo as Bank of America, Banc of America Securities LLC references this very lawsuit and states that on April 8, 2002:

> ***[T]he Company was named as a defendant*** along with, among others, commercial and investment banks, certain current and former Enron officers and directors, lawyers and accounts in a putative consolidated class action complaint filed in the United States District Court for the Southern District of Texas alleging violations of Sections 11 and 15 of the Securities Act of 1933 and Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. On May 8, 2002, ***the Company filed a motion to dismiss*** the complaint and on December 20, 2002, the Court granted the motion in part, dismissing the claims asserted under Section 10(b) and Rule 10b-5 of the Exchange Act. A Section 11 claim on a single securities offering ***remains pending against the Company***.

See Ex. 1. Interestingly, in the 2002 annual report of Bank of America, Bank of America in discussing litigation, states that:

> On April 8, 2002 ***the Corporation was named as a defendant*** along with, among others, commercial and investment banks, certain current and former Enron officers and directors, lawyers and accountants in a putative consolidated class action complaint filed in the United States District Court for the Southern District of Texas alleging violations of Sections 11 and 15 of the Securities Act of 1933 and Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. On May 8, 2002, ***the Corporation filed a motion to dismiss*** the complaint and on December 20, 2002, the Court granted the motion in part, dismissing the claims asserted under Section 10(b) and Rule 10b-5 of the Exchange Act. A Section 11 claim on a single securities offering ***remains pending against the Corporation***.

See Ex. 2 at 98. Thus, it appears clear from the parallel language in both filings that not only has Banc of America Securities LLC always considered itself a defendant in this action, indeed it appears the two companies treat themselves as one entity in regards to this litigation. This is but one telling example which shows Bank of America has failed to meet its burden of showing an absence of a genuine issue as to any material fact. It is clear the evidence is such that a reasonable jury could return a verdict for Lead Plaintiff, the non-moving party, here.

Other examples of how Bank of America and its subsidiary Banc of America Securities LLC treat themselves as one firm abound include the following. In the Bank of America 2002 Annual Report, in regards to risk management, the company states its corporate governance structure enables it to manage "all major aspects of our business through an integrated planning and review process." Ex. 2 at 36. Regarding liquidity risk management, the company states "[p]arent company liquidity is maintained at levels sufficient to fund holding company and non-bank affiliate operations during various stress scenarios in which access to normal funding sources is disrupted." *Id.* at 37. Additionally, in its annual report discussing Enron, the company reports its total exposure to Enron

as $503 million before a charge-off of $210 million and a $21 million write-off of Enron securities related to a collateralized loan obligation. *Id.* at 45. There is no indication the company treats its dealing with Enron in any manner other than as an integrated unit.

Bank of America also consolidates results from its subsidiaries into its consolidated statement of income. The company's accountants also report on both the corporation and subsidiaries. *See Id.* at 71-75. Again, stressing its full range of product offerings, the Bank of America annual report states that "Bank of America Corporation and its subsidiaries (the Corporation) through its banking and nonbanking subsidiaries, provide a diverse range of financial services and products throughout the U.S. and in selected international markets." *Id.* at 76.

The facade of separateness is also exposed in the Bank of America Corporation Form 10-K filed for the fiscal year ended December 31, 2002. For example, the total number of employees listed by the company includes those at both Bank of America Corporation and at all of its subsidiaries. *See* Ex. 3 at 4. The company also notes that "[a]s of December 31, 2002, the principal offices of the corporation and each of its business segments were located in the 60-story Bank of America Corporate Center in Charlotte, North Carolina, which is owned by a subsidiary of the Corporation." *Id.* at 5. Another indication of the single nature of Bank of America and its subsidiary is noted in the Banc of America Securities LLC statement of Financial Condition regarding related party transactions:

> The Company [Banc of America Securities LLC] contracts a variety of services from the Corporation and certain of its subsidiaries. Such services include accounting, legal, regulatory compliance, transaction processing, purchasing, building management and other services. The Company also clears futures and options on futures transactions through affiliated companies. The Company provides securities and underwriting, loans syndication, loan trading and investment advisory services to the Corporation and certain affiliate banks. The Company also acts as agent in selling assets originated by affiliate banks.

See Ex. 1 at No. 10. Also, Banc of America Securities LLC notes that the corporation (Bank of America) provides retirement benefits, health care and life insurance benefits for active and retired employees. *Id.* The Banc of America Securities LLC's Statement of Financial Condition notes substantially all employees of Banc of America Securities LLC participate in Bank of America's stock-based compensation plans, which provide for the issuance of the corporation's stock-related

awards such as stock options and restricted stock awards. *Id.* at No. 11 Another example of this single entity can be found on the Banc of America Securities LLC Web site, where it is clear that Banc of America Securities LLC's copyrights are owned by the parent corporation, Bank of America. *See* Ex. 4.

The Gilliam and Stark affidavits do nothing to weaken the evidence noted above, which at the very least raises a genuine issue of material fact. Bank of America claims there is no "legal or factual justification" for treating it and its subsidiaries as a single entity. Motion at 7. But even without the benefit of ***any*** discovery, Lead Plaintiff's evidence, detailed above, clearly demonstrates Bank of America has not met its substantial burden in showing that it is entitled to summary judgment.

B. Bank of America Is Liable as an Enterprise

Bank of America, as each of the bank defendants in this case, is attempting to exploit the multiple entities in its organization. This is no wonder, for Bank of America, like each of the banks, organized its enterprise with a view to reducing potential liability under the securities laws. But, as Judge Posner stated in *Papa v. Katy Indus.*, 166 F.3d 937, 941 (7th Cir. 1999), "[t]he privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties."

Treating a holding company and its affiliated subsidiaries as one entity for the purposes of assessing liability consistent with the intent of Congress, sometimes referred to as "enterprise liability," is well-accepted. *See, e.g., Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 763 (5th Cir. 1997) (noting that in "civil rights actions, 'superficially distinct entities may be exposed to liability upon a finding they represent a single, integrated enterprise'"). Indeed, the Supreme Court recognized the validity of enterprise liability when it refused to acknowledge the legal separation of a ***bank holding company and its subsidiary*** even though the separate legal entities were "organized in good faith and [were] not a sham." *Anderson v. Abbott*, 321 U.S. 349, 356 (1944). The Court went on to state:

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Justice Cardozo stated that a surrender of that principle of limited liability would be made "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld." The cases of fraud make up part of that exception. But they do not exhaust it.... ***It has often been***

> ***held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. The Court stated in Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Assn., that "the courts will not permit themselves to be blinded or deceived by mere forms or law" but will deal "with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." We are dealing here with a principle of liability which is concerned with realities not forms.***

Id. at 361-63.

The principles espoused by the Supreme Court in 1944 are very much effective today. As articulated by one esteemed commentator:

> In the last decade and one half, the Supreme Court has had to resolve, in a series of major cases, controversies presenting a fundamental jurisprudential choice between enterprise law and traditional corporate entity law. Enterprise law would determine the legal rights and obligations of the parties by focusing on the corporate group as a unit and traditional corporate entity law by treating the various constituent corporations as separate juridical entities, each with its separate rights and obligations.
>
> In each of these cases, the Court embraced enterprise principles firmly in order to implement the underlying objectives of the law in the area and rejected application of the traditional corporate doctrines .... In some of these cases, the Court accompanied its rejection of entity law by pointing out the lack of utility of "piercing the veil jurisprudence" in contributing a solution to the jurisprudential problems involved.

Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996). As made clear by Blumberg, enterprise liability is a crucial component of the laws governing the banking industry. "***American banking law, federal and state, is committed firmly to enterprise law.***" *Id.* Enterprise principles also "play a major role" in the federal securities laws, as manifested in the statutes providing for control-person liability. *Id.*

While enterprise liability is mutually exclusive of control-person liability, the purpose and intent of the two are consistent. Lead Plaintiff respectfully submits that Bank of America should not be allowed to circumnavigate securities laws by hiding behind the maze of subsidiaries of affiliated entities that it engineered.

III. The Evidence Will Demonstrate Bank of America Is Subject to Control Person Liability for Federal Securities Law Violations Committed by its Subsidiaries and Affiliates

Bank of America is subject to secondary liability under §15 of the 1933 Act for the securities violations of its subsidiaries and affiliates. Noticeably absent from Bank of America's motion for summary judgment is any reference to the claims Lead Plaintiff pleaded against Bank of America under §15 of the 1933 Act. *See* ¶¶104, 773-786.

Sections 15 and 20(a) are remedial in nature and should be construed liberally. *See, e.g., Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 877, 880-81 (7th Cir. 1992) (cited favorably in *In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *36 (S.D. Tex. Jan. 28, 2003)); *Myzel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967). "Although worded in different ways, the control person liability provisions of §15 of the 1933 Securities Act and §20(a) of the 1934 Exchange Act are interpreted the same way." *In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 594 (S.D. Tex. 2002). Thus, to state a valid claim under §§15 or 20(a), a plaintiff need only allege: (i) a violation of the securities laws; and (ii) the defendant was a controlling person with respect to the violation within the meaning of §§15 and 20(a). *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 867 n.17 (S.D. Tex. 2001).

This Court recently stated:

> In the absence of a statutory definition of "control," the SEC has defined the word as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ***ownership of voting securities, by contract, or otherwise***." 17 C.F.R. §240.12b-2(f), quoted in *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957 (5th Cir. 1981). Furthermore, the legislative history of the controlling person provision indicates control can be shown by ***ownership of stock, agency***, a lease or a ***contract***, and that the concept of control should be broadly construed with sufficient flexibility to cover many situations, not necessarily only those foreseen at the time of enactment.

Enron, 2003 U.S. Dist. LEXIS 1668, at *33.[2] Similarly:

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[2]*See also* Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 Notre Dame L. Rev. 263, 314 (1997) (cited in *Enron*, 2003 U.S. Dist. LEXIS 1668, at *33, *65-*69). *See also* Dana M. Muir and Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is it Curtains for Veil Piercing?*, 1996 U. Ill. L. Rev. 1059, 1093 (1996) (noting "because of the direct liability of controlling persons under the [securities] statutes, courts generally do not need to decide whether to pierce the corporate veil.... Rather, those persons and entities who might be held accountable under a veil piercing analysis are instead held directly liable under the terms of the statutes").

> Section 20(a) could also allow plaintiffs to reach defendants that control wrongdoers through ***holding companies***, by family connections, ***or in other nonagency ways. Controlling shareholders could be reached in situations where piercing the corporate veil was not available*** .... In other words ... the controlling person liability provisions of the 1933 and 1934 Acts were aimed primarily at situations of control over firms (and others) by behind-the-scene actors. ***To repeat, enactment of the controlling provisions of the 1933 and 1934 Acts "was motivated by the fear that traditional theories of secondary liability, such as agency, would not prove adequate, in every case, to extend liability to those who were 'really responsible' for violations of the securities laws***."

Id. at *44 n.22.

This Court has repeatedly observed that "the Fifth Circuit has rejected the requirement that a plaintiff must show that the controlling person actually participated in the underlying violation, and appears to insist that a plaintiff need only demonstrate that the controlling person possessed 'the power to control [the primary violator], [but] not the exercise of the power to control.'" *Enron*, 2003 U.S. Dist. LEXIS 1668, at *41-*42 (citing 235 F. Supp. 2d at 594); *see also BMC Software*, 183 F. Supp. 2d at 869 n.17.[3] As this Court noted,

> control can be established by demonstrating that the defendant possessed the power to direct or cause the direction of the management and policies of a person through ***ownership of voting securities***, by contract, ***business relationships, interlocking directors, family relationships, and the power to influence and control the activities of another***.

235 F. Supp. 2d at 598. Thus, courts will generally find control person liability if plaintiffs make a *prima facie* showing defendants had the abstract, indirect power, whether exercised or not, to control a primary violator – and such power was possessed via business relationships, directorships, or even the power to "influence" the activities of another. *See Abbott*, 2 F.3d at 620; *BMC Software*, 183 F. Supp. 2d at 869 n.17; *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 638 (S.D.N.Y. 1999).

Although admitting it possesses the power to control its subsidiaries and affiliates, Bank of America contends it "has not committed, and is not responsible for any actionable conduct" and

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[3] *See also Abbott v. Equity Group*, 2 F.3d 613, 620 (5th Cir. 1993) (actual participation in the underlying §10(b) violations is not required; whether effective day-to-day control of the general operations and affairs of the company is necessary to impose controlling person liability is uncertain); *Enron*, 2003 U.S. Dist. LEXIS 1668, at *67 ("'[t]he decisional actors within formal organizational hierarchies with authority to ratify, manage and monitor are ***majority shareholders, boards of directors***, and executive officers'") (quoting Carson, *supra*, 72 Notre Dame L. Rev. at 281-83).

therefore, is not a proper party to this action. Motion at 2. Similarly, Bank of America repeatedly argues it can only be liable for the conduct of its subsidiaries if the corporate form may be ignored. Motion at 7-12. These arguments are meritless. *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *44 n.22 (***under §20(a) "[c]ontrolling shareholders could be reached in situations where piercing the corporate veil was not available"***). There is more than enough evidence for a reasonable jury to conclude Bank of America controls its subsidiaries.

Bank of America has identified the subsidiary involved in the transactions alleged by Lead Plaintiff. Motion at 4-5. Bank of America admits it owns the subsidiary which plaintiffs allege was in violation of §11 of the 1933 Act. *See* Motion at 2 ("***Bank of America and its affiliated companies generally own up to and including 100% of the voting shares of each subsidiary directly or indirectly*** ...."). Furthermore, Bank of America admits that Bank of America and its subsidiaries have close ties and "overlap in officers and employees." Motion at 3. For example, the Annual Report of Bank of America counts as employees all who work for the company and subsidiaries. *See* Ex. 3 at 4. Bank of America owns the significant trademarks and copyrights of its subsidiaries. *See* Ex. 4. And Bank of America describes its companies as an integrated enterprise with Bank of America at the top. For example, Bank of America states "Bank of America Corporation and its subsidiaries (the Corporation) through its banking and nonbanking subsidiaries, provide a diverse range of financial services and products ...." Ex. 2 at 76.

Even if this were not enough to demonstrate Bank of America's control of its subsidiaries (it is), the issue of control could not be determined at this time. Control is a fact-intensive question appropriate for determination by a jury. *See, e.g., Executive Telecard*, 913 F. Supp. at 286 (issue of controlling person liability "is necessarily fact-intensive" and a question for a jury); *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 143 (S.D.N.Y. 1999) ("fact-intensive" question for a jury); *In re Paracelsus Corp.*, 6 F. Supp. 2d 626, 633 (S.D. Tex. 1998) (question of control "is generally a fact intensive question"); *Klapmeier v. Telecheck Int'l, Inc.*, 315 F. Supp. 1360, 1361 (D. Minn. 1970) ("complex fact question"); *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1368 (S.D. Fla. 2001) (fact-intensive issue). The evidence demonstrates Bank of America had the power to control its subsidiaries and the determination of control should now be left to the jury.

IV. The Evidence Will Demonstrate Bank of America Is Subject to Liability for Acts of its Agents

Also noticeably absent from Bank of America's motion is any attempt to address the issue of Bank of America's liability based upon the securities law violations of its agents. Lead Plaintiff's complaint clearly alleges Bank of America is liable not only for the actions it performed directly but also for those actions performed by its subsidiary acting as agent of the parent corporation – actions which were conducted at the direction of Bank of America. *See* ¶¶104, 773-788. Fifth Circuit precedent leaves no ambiguity as to the viability of plaintiffs' theory of liability:

> ***[C]ommon law agency principles, including the doctrine of respondeat superior, remain viable in actions brought under the Securities Exchange Act and provide a means of imposing secondary liability for violations of the Act independent of §20(a).***
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> * * *
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> Limiting secondary liability under the 1934 Act to that liability provided by §20(a) would contradict the pervasive application of agency principles in nearly all other areas of the law.

Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111, 1118 (5th Cir. 1980); *see also Tranchina v. Howard, Weil, Labouisse, Friedrichs*, No. 95-2886, 1997 U.S. Dist. LEXIS 12361, at *14-*15 (E.D. La. Aug. 18, 1997) (acknowledging continued force of *respondeat superior* after *Central Bank*).

The simple fact that the principle-agent relationship alleged by plaintiffs is that of a parent company and its wholly owned subsidiary does not diminish Bank of America's potential liability. "***[T]he relationship between a corporation and its subsidiary is analyzed with the same agency principles that apply to natural persons or otherwise unrelated corporations***." *United States v. Tianello*, 860 F. Supp. 1521, 1525 (M.D. Fla. 1994); *see also Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *Restatement (Second) of Agency* §14M (1958). Thus:

> It is an accepted principle of agency that the term "agent" includes both natural persons and corporations. Likewise, a "principal" may be either human or a corporation. Further, the terms "master" and "servant" denoting a particular kind of principal-agent relation can properly be applied to corporations notwithstanding the anthropomorphic sound of the titles. It follows that a corporation can be an agent for another corporation. It also follows that a corporation may be liable as a master for torts committed by its servants including torts committed by the servants of a corporation which is its servant....

> A special situation arises when two corporations have a permanent connection with each other through ownership by one of a controlling stock interest in the other or through ownership of a controlling interest in both corporations by one person or corporation. Where such a situation exists the stock control gives the parent a power to convert the relation into one of agency.

Reporters Notes *Restatement (Second) Agency* §14M.

Bank of America apparently suggests Lead Plaintiff's claims can only succeed upon a ruling to pierce the corporate veil. This is wrong, and agency theory is distinct from veil piercing.

> ***Suing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil.*** In the first instance, the claim against the parent is premised on the view that the subsidiary had authority to act, and was in fact acting, on the parent's behalf – that is, in the name of the parent.... In the latter situation, the putative plaintiff does not dispute that the underlying obligation belongs to the corporate subsidiary; however, he seeks to hold the parent liable on the theory that the parent fraudulently induced the subsidiary to incur the obligation.
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> * * *
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> "[J]ust as one corporation can hire another to act as its agent, a parent can commission its subsidiary to do the same. ***If such an agency arrangement is alleged, then the plaintiff should not have to also allege domination and intent to defraud for the claim to survive***. The parent-principal should not be allowed to escape liability simply because it owns stock in the subsidiary-agent. Rather, as in any agency case, the issue should be one of authority: did the subsidiary have authority, actual or apparent, to act on behalf of the parent?
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> * * *
>
> [T]his rule will not undermine jealously safeguarded notions of corporate separateness. The theory behind any such agency claim is that the subsidiary's acts were, in both form and substance, those of the parent. ***Thus, there is no veil to pierce – the parent is the only party in interest***.

Royal Indus. v. Kraft Foods, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996); *see also TransAmerica Leasing*, 200 F.3d at 849; *Expediters Int'l v. Direct Line Cargo Mgmt. Servs.*, 995 F. Supp. 468, 481 (D.N.J. 1998); *National Council on Compensation Ins. v. Hopkins*, No. 1:92-CV-082, 1995 U.S. Dist. LEXIS 21030, at *80 (E.D. Tenn. Dec. 19, 1995) ("The principal corporation can be held liable for the acts of its agent within the scope of the agent's authority. The agency theory is distinguishable from the usual 'piercing of the corporate veil' and 'alter-ego doctrines.").

The question "how much control is required before parent and subsidiary may be deemed principal and agent ... defies resolution by 'mechanical formulae,' for the inquiry is inherently fact-specific" and, thus, warrants denial of Bank of America's motion. *TransAmerica Leasing*, 200 F.3d

at 849; *see also National Council*, 1995 U.S. Dist. LEXIS 21030, at *80 ("ordinarily an issue of fact for the jury"). In any event, the demonstrated significant control that Bank of America has over its subsidiaries is sufficient for a reasonable jury to conclude there is an agency relationship between Bank of America and its investment bankers and analysts. *See supra* at 9-10.

V. Veil Piercing Is Irrelevant to this Case, and, in Any Event, Premature at this Stage in the Litigation

Bank of America asserts that "it cannot be held liable for the alleged wrongful acts of its independent subsidiaries" because there is not adequate evidence to create a genuine issue as to whether Bank of America's "corporate veil" may be "pierced." Motion at 6-12. This is a red herring. As shown herein, Bank of America has failed to refute that it can be subject for the securities law violations of Bank of America Securities LLC.

Even if veil piercing were relevant to Bank of America's liability in this action, the cases Bank of America cites would ***not*** support Bank of America's position that the case against it must be dismissed. In *United States v. Bestfoods*, 524 U.S. 51, 62 (1998), the Supreme Court held that the "corporate veil" may be "pierced" when it is "misused" to avoid liability, as can be demonstrated here. In *Abbell Credit Corp. v. Bank of America Corp.*, No. 01 C 2227, 2002 WL 335320, at *4 (N.D. Ill. Mar. 1, 2002) and *Zishka v. American Pad & Paper Co.*, No. 3:98-CV-0660-M, 2000 U.S. Dist. LEXIS 13300, at *13-*14 (N.D. Tex. Sept. 13, 2000), plaintiffs had not argued or alleged facts to support the argument that corporate formalities should be disregarded. Here there is an evidentiary basis to pierce Bank of America's purported veil and Lead Plaintiff asserts piercing the veil would be appropriate if the issue were relevant to Bank of America's liability. *See supra* at 9-10.

But, Bank of America does not (and cannot) cite any authority which states the "corporate veil" must be "pierced" in order for liability to attach to a violator of the securities laws. *See* for example *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260 (D. Del. 1989). Indeed, the securities cases which Bank of America cites are not veil-piercing cases and there was no direct parent liability alleged in those cases, unlike here.[4]

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[4]*See Chill v. GE*, 101 F.3d 263 (2d Cir. 1996); *McNamara v. Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622 (E.D. Tex. 2001); *In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530 (Del. Ch. 2001). For example, in *Chill*, the court affirmed dismissal of a securities case brought only under §10(b)

Not only is Bank of America's veil-piercing argument irrelevant, it is premature for resolution. As the Fifth Circuit held in *Jon-T Chem.*, 768 F.2d at 694, resolution of whether a parent corporation is responsible for acts of its subsidiaries is "heavily fact-specific." Specifically, "whether it is a defendant who seeks to preserve a corporate shield over him, or a plaintiff who is attempting to pierce the corporate veil, corporate disregard often raises genuine issues of material fact, thus making summary judgment inappropriate." *American Mgmt. Corp. v. Dunlap*, 784 F. Supp. 1245, 1248 (N.D. Miss. 1992).[5] The cases Bank of America cites also support the proposition that veil piercing cannot occur before there has been a fully-developed factual record.[6]

VI. Alternatively, Lead Plaintiff Requests That the Court Deny or Continue Bank of America's Motion, Pursuant to Rule 56(f)

Bank of America's motion should be denied for failing to demonstrate there is no genuine issue of material fact as to its liability. However, if this Court decides that Bank of America's motion, is, instead premature, Bank of America's motion should be denied or continued pursuant to Rule 56(f). The discovery stay in this action was lifted on April 23, 2003. *See* April 23, 2003

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and Rule 10b-5 because the plaintiff failed to allege scienter on the part of the parent corporation, not because the claims were premised solely on false statements by the subsidiary. 101 F.3d at 266-272. In contrast, here, Bank of America faces liability under §§11 and 15 and thus, Lead Plaintiff need not prove scienter.

[5]*See also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1129, 1133 (N.D. Ala. 1993) ("Given the fact-intensive nature of the veil-piercing analysis, the determination is typically one to be resolved at trial ...."), *vacated in part on other grounds*, 887 F. Supp. 1455 (N.D. Ala. 1995); *Carte Blanche PTE., Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908, 914 (S.D.N.Y. 1991) ("fact-intensive issue that generally must be submitted to the jury").

[6]*See Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, No. 8578, 1990 Del. Ch. LEXIS 46 (Del. Ch. Apr. 12, 1990). The court, after reviewing deposition transcripts, minutes of board meetings, and other evidence found plaintiffs had introduced enough evidence to "support their claim of veil piercing" ***and were able to "defeat[] defendants' claim for judgment in their favor as a matter of law.***" *Id.* at *16. Thus, *Mabon* not only supports Lead Plaintiff because summary judgment was ***denied***, it also illustrates that courts require a developed record to make determinations regarding veil piercing. *See, e.g., Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1455 (2d Cir. 1995) ("extensive discovery"); *Secon Serv. Sys. Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 409 (7th Cir. 1988) (three years of discovery); *Trustees of Arden v. Unity Constr. Co.*, No. 15025, 2000 Del. Ch. LEXIS 7 (Del. Ch. Jan. 26, 2000) (summary judgment granted in part and denied in part after review of depositions and discovery); *Carballo Rodriguez v. Clark Equip. Co.*, 147 F. Supp. 2d 63, 66 (D.P.R. 2001) (summary judgment granted "after adequate time for discovery"); *Zubik v. Zubik*, 384 F.2d 267 (3d Cir. 1967) (judgment affirmed after trial); *Laborers' Pension Fund v. Litgen Concrete Cutting & Coring Co.*, 709 F. Supp. 140, 143 (N.D. Ill. 1989) ("the question of whether the court should disregard a corporations limited liability is usually one of fact"), *Mobil Oil*, 718 F. Supp. at 262 (discovery conducted).

Memorandum and Order re Remaining Enron Insider Defendants. Only seven days later, on April 30, 2003, defendant Bank of America moved for summary judgment. However, "Summary judgment assumes ***some*** discovery." *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002); *see also F.D.I.C. v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993) ("Summary judgment is appropriate if, ***after discovery***, there is no genuine dispute over any material fact."); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) ("Rule 56 mandates the entry of summary judgment, ***after adequate time for discovery***."); *Anderson*, 477 U.S. at 257 (summary judgment may be entered against a plaintiff "***as long as the plaintiff has had a full opportunity to conduct discovery***"). Here, assuming Lead Plaintiff were required to move forward with further evidence in response to Bank of America's motion, the discovery to date is clearly inadequate for any purpose.

A. Legal Standards for Denial or Continuance Pursuant to 56(f)

Rule 56(f) provides, in relevant part:

> Should it appear from the affidavits of a party opposing [a summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

Federal Rule of Civil Procedure 56(f) is an alternative to opposing summary judgment by affidavit and "'is designed to safeguard against a premature or improvident grant of summary judgment.'" *Brown*, 311 F.3d at 333 n.5; *see also* 10A Charles Alan Wright et al., *Federal Practice and Procedure Civil 3d* §2740 (1998). The Fifth Circuit has stated that Rule 56(f) "motions are generally favored, and should be liberally granted." 311 F.3d at 333 n.5. Furthermore, "[w]here the evidence that the non-moving party contends will create a genuine issue for trial is in the exclusive possession of the moving party, """a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."""" *Id.*; *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (same); *see also Snook v. Trust Co.*, 859 F.2d 865, 871 (11th Cir. 1988) ("the interests of justice will sometimes ***require*** a district court to postpone its ruling on a motion for summary judgment").

In the Fifth Circuit, "[a] party opposing summary judgment under Rule 56(f) must demonstrate (1) why additional discovery is needed and (2) how the additional discovery will likely create a genuine issue of material fact." *Brown*, 311 F.3d at 333 n.5; *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999). As set forth below and in the Affidavit of Helen J. Hodges herewith, Lead Plaintiff has satisfied the requirements of Rule 56(f) and alternatively requests denial or continuance of Bank of America's motion, if necessary.

B. Lead Plaintiff Has Satisfied the Requirements of Rule 56(f)

Given that discovery has now proceeded for only a matter of days, Lead Plaintiff's alternative request under Rule 56(f) is compelling. This not-so small fact is completely ignored by Bank of America in its motion as it repeatedly asserts "the undisputed facts" show Bank of America did not engage in the conduct alleged to be in violation of the securities laws. *See* Motion *passim*. If Lead Plaintiff were required to respond to Bank of America's motion with further evidence, there is no question additional discovery would be needed, for no production whatsoever has been made by Bank of America to plaintiffs. This is significant because the evidence regarding Bank of America's liability is almost entirely within Bank of America's control.

It would be inequitable for plaintiffs to be compelled to reveal an entire discovery plan at this early stage of the litigation. Nevertheless, should this Court decide to continue Bank of America's motion rather than deny it, Lead Plaintiff can identify the following discovery needs which are representative of an overall discovery plan that will be conducted to prove Bank of America's liability.

First, Lead Plaintiff seeks discovery about its knowledge of the false statements made by its analysts and investment bankers, as alleged in the Consolidated Complaint. *See, e.g.*, ¶¶104, 113, 120, 132, 148, 161, 715-734, 992-997, 1005-1008. Bank of America does no more than identify the name of its controlled subsidiary that (i) issued Enron analyst reports and (ii) underwrote Enron securities offerings. Motion at 4-5. According to Bank of America, this meets its burden, but such evidence does not establish the absence of a genuine issue under the theories of liability available to Lead Plaintiff. If Lead Plaintiff were required to present additional evidence, it should be entitled to the relevant discovery, similar to that described above. *See* Hodges Aff., ¶¶4-5, 8, 11-14 (*see*

Document Request No. 52. Documents concerning research reports on Enron; No. 55. Communication between any Bank of America investment banker and any research analyst concerning Enron; No. 62. "Pitch books" or other presentation documents which Bank of America presented to Enron concerning marketing or execution of any transaction or service; No. 63. Documents concerning any offering of Enron securities, including due diligence files).

In addition, Lead Plaintiff seeks discovery that would further evidence Bank of America is a single enterprise composed of Bank of America and the subsidiaries and affiliates it owns and controls. Bank of America states that its subsidiary "provides its own diverse services, from brokerage to underwriting to investment banking advice," that it is "adequately funded," "runs its own daily operations, chiefly without direction by, or commonality of, Bank of America officers," "maintains its own books and records, bank accounts, accounts receivable, lines of credit and other assets on a day-to-day basis," and "holds separate and individual board meetings." Motion at 10. But at the same time the evidence, including Bank of America's admissions, demonstrates that Bank of America owns its subsidiaries and their trademarks and copyrights, has stock voting control of its subsidiaries, has overlapping top officers and employees, and holds itself out as a single enterprise. *See supra* §II.A. There should be no question contradictory inferences may reasonably be drawn from the undisputed evidentiary facts here. However, if Lead Plaintiff were required to present additional evidence, it should be entitled to the relevant discovery, similar to that described above. *See* Hodges Aff., ¶¶4-5, 8, 11, 14. *See* Lead Plaintiff's First Request for Production of Documents, attached as Ex. A to the Hodges Aff. Furthermore, Lead Plaintiff is entitled to discovery regarding the corporate structures within Bank of America's enterprise, including such matters as the common officers, executives and directors, contracts defining the business relationship between the entities, and management of responsibility or the Enron relationship. Lead Plaintiff has served interrogatories on this very issue. *See* Plaintiffs' First Set of Interrogatories to Defendants Bank of American Corp. and Banc of America Securities LLC, attached as Ex. C to the Hodges Aff.

Lead Plaintiff is entitled to have these defendants produce all documents regarding the corporate structures of the allegedly separate organizations. Bank of America has submitted the affidavits of Allison Gilliam and Edward Stark to support its motion. Lead Plaintiff should be

entitled to depose those persons to determine if, concerning the transactions at issue, those persons have personal knowledge beyond simply the names of the Bank of America entities that were involved.

Because ***no*** discovery has taken place in this action and given the genuine issues of material fact that this discovery will create, defendant's motion is premature and should be denied.

VII. Conclusion

Lead Plaintiff respectfully requests the Court deny Bank of America's motion because Bank of America has not met its substantial burden under Rule 56(c) or, alternatively, deny or continue Bank of America's motion pursuant to Rule 56(f).

DATED: May 20, 2003

Respectfully submitted,

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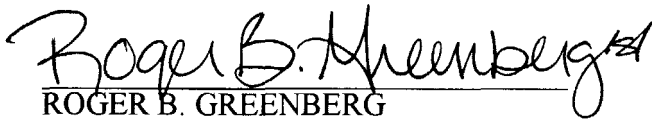

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f) has been served by sending a copy via electronic mail to serve@ESL3624.com on this 20th day of May, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f) has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 20th day of May, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004

Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk